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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 273

SOUTH TEXAS COMMERCIAL NATIONAL BANK OF HOUSTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 30–37) is reported at 7 T. C. 764. The opinion of the Circuit Court of Appeals (R. 109–111) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 25, 1947 (R. 111–112). The petition for a writ of certiorari was filed on August 16, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the so-called "pension" trust, to which the taxpayer made transfers in the taxable years, was part of a pension "plan" to provide for the payment of reasonable "pensions", so as to be an exempt trust within the meaning of Section 165 of the Internal Revenue Code, and to permit the taxpayer to deduct in the taxable years, under Section 23 (p) of the Code, percentages of the amounts transferred.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are printed in the Appendix, *infra*, pp. 13–22.

STATEMENT

The facts found by the Tax Court (R. 31–33) may be summarized as follows:

On January 9, 1940, the taxpayer, a national bank with principal place of business at Houston, Texas, established a trust which it designated an "Employees' Pension Trust," by an instrument executed by itself in its corporate individual capacity to itself as trustee. The trust agreement provided that the trust estate should consist of the sum of $85,000 but that the taxpayer might in the future make further contributions to the estate, without, however, being under any obligation to do so (R. 31).

The trustee was authorized, out of the income or, if necessary, the corpus of the trust estate, to

pay to the present and future officers and employees of the taxpayer pensions in such amounts and at such times as the trustee in its absolute, uncontrolled discretion might determine. The trustee could select the retired employees to receive these payments, the amount which each individual should receive, and the trustee could at any time reduce or discontinue entirely any payments to any beneficiary. Its powers in this respect were the same as "if the trustee were an individual person and the actual owner thereof." However, the trustee was controlled in its discretion by the board of directors and the trust committee of the taxpayer (R. 31–32).

No beneficiary of the trust made any contribution to the trust fund, nor did such beneficiaries have any contractual or legal rights in the fund whatsoever (R. 32).

The trust was declared to be irrevocable, to continue until final distribution of the entire trust estate. In the event of the dissolution of the taxpayer, the trustee was authorized and directed to distribute the corpus of the trust among the beneficiaries in whatever amounts and to whatever individuals the trustee chose to extend its bounty (R. 32).

The taxpayer, as trustor, reserved the right to amend the trust agreement in any manner considered desirable to procure a more advantageous administration and a more efficient accomplishment of the purposes of the trust, with the single

limitation that no part of the trust estate, either corpus or accumulated income, could be diverted to any purpose other than the one set forth in the trust agreement (R. 32).

At the time the trust was created, a copy of the agreement was printed in pamphlet form and distributed to the employees and thereafter no communication was made by the taxpayer, either individually or as trustee, to its employees relative to the "pension plan." If new employees were informed as to the pension plan, it was not done officially, either by the taxpayer as trustor or trustee (R. 32–33).

Taxpayer paid into the trust $150,000 in 1940, $85,000 in 1941, and $165,000 in 1942, and deducted from its income in 1940, $15,000, or ten percent of the $150,000 contributed to the trust. In 1941 it deducted $23,500 or ten percent of the total amount it had contributed to the trust in 1940 and 1941. In 1942 it deducted $40,000, being ten percent of the amount of all prior contributions. The trustee paid out of the trust fund certain amounts to its retired employees according to the discretion of the trustee during the years involved here (R. 33).

Upon these facts, the Tax Court held that the taxpayer was not entitled to the deductions claimed in the taxable years under Section 23 (p) of the Internal Revenue Code (R. 33–37) and the Circuit Court of Appeals affirmed (R. 109–111).

ARGUMENT

The judgment of the lower court is not in conflict with any decision and is correct.

In order for the taxpayer to be entitled to deduct from its income percentages of the amounts transferred by it in the taxable years to its employees' trust under Section 23 (p) of the Internal Revenue Code as it stood before its amendment in 1942 (Appendix, *infra,* p. 13, and see *infra,* p. 11), the trust must be a "pension trust to provide for the payment of reasonable pensions" to its employees (Sec. 23 (p) (1)), and the trust must form "part of a * * * pension * * * plan * * * for the exclusive benefit of some or all" of its employees (Sec. 165, Internal Revenue Code;[1] Appendix, *infra,* p. 14).

These statutory provisions, at the very least, connote a sound plan under which those eligible for, and the amounts of, the pensions to be paid, are determined by a consistent and reasonable method, bearing a relation to the salary earned, the length of service, and the age of the recipient.[2]

[1] Section 23 (p) (3) of the Code conditions the allowance of the deductions upon the retirement that the trust shall conform to the specifications of Section 165.

[2] In connection with the amendments made to Sections 23 (p) and 165 by Section 162 of the Revenue Act of 1942, c. 619, 56 Stat. 798, see *infra,* p. 11, H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 50–51 (1942–2 Cum. Bull. 372), states:

"The present law endeavors to encourage the setting up of retirement benefits by employers for their employees and in

Cf. 4 Mertens, *Law of Federal Income Taxation* (1942), Sec. 25.74. Further, however, the legislative history shows that the sort of pension plan contemplated by the statutory provisions was one having an actuarial basis. Section 23 (p) of the Code originated in substantially the same form as Section 23 (q) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and in connection therewith, H. Conference Rep. No. 1882, 70th Cong., 1st Sess., p. 12 (1939–1 Cum. Bull. (Part 2) 444, 445–446), explained that the deduction was permitted, upon the creation of a pension trust, "to build up reserves in order to place the plan upon a basis which is actuarily sound". S. Rep. No. 1567, 75th Cong., 3d Sess., p. 24 (1939–1 Cum. Bull. (Part 2) 779, 796), again indicated, in connection with an amendment of Section 165 by the Revenue Act of 1938, c. 289, 52 Stat. 447, that the type of pension trust contemplated by the statute is one resting on actuarial computations. The

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pursuance of this policy permits employers to take as a deduction amounts irrevocably set aside in a pension trust or other fund to provide annuities or retirement benefits for superannuated employees. This provision has been considerably abused by the use of discriminatory plans which either cover only a small percentage of the employees or else favor the higher paid or stock-holding employees as against the lower-paid or non-stock-holding employees. Under the present law, it is contended the officers of a corporation may set up pension plans for themselves and make no provision for the other employees. Such actions are not in keeping with the purpose of this provision."

legislative purpose in this respect is specifically implemented by the administrative regulations. Section 19.23 (p)–1 of Treasury Regulations 103 (Appendix, *infra*, pp. 14–16), continuing a provision first contained in Article 271 of Treasury Regulations 74,[3] promulgated under the Revenue Act of 1928, requires that the trust must operate on a plan for pensions which is actuarially sound, and Section 19.23 (p)–2 (Appendix, *infra*, pp. 16–19) prescribes the maintenance of information with respect to actuarial valuations for reserves. And cf. Section 19.165–1 (e) of Treasury Regulations 103 (Appendix, *infra*, pp. 20–22).

The Tax Court found (R. 34–37) that the arrangement in this case does not have sufficient definiteness to be a "plan", nor are the payments made and to be made from the fund "pensions" within the meaning of the statute. The Circuit Court of Appeals agreed with these findings (R. 111), and the facts fully support them, if they do not compel them. No employee had any rights of any kind with respect to receipt of benefits. The taxpayer under the trust retained the absolute and uncontrolled power to select the employee beneficiaries of the fund, no standards

[3] The long-standing regulation is thus deemed to have Congressional approval and the effect of law. *Crane* v. *Commissioner*, No. 68, Oct. Term, 1946, decided by this Court on April 14, 1947; *Helvering* v. *Winmill*, 305 U. S. 79, 83.

whatever for eligibility being established,[4] to determine if, when, and how long payments to any chosen beneficiary would be made, and to decide how much would be paid to each designated beneficiary, irrespective of his age, length of service, or former salary, subject only to the limitation that the monthly payment could not exceed $250 or be less than $25. The trust did not contemplate payments on an actuarial basis and the fund was not based on actuarial computations or liabilities. (R. 58, 65.)

There is no merit to the contention (Pet. 6–7) that both lower courts erroneously applied the statute, on the theory that the statute requires at most a plan to pay "reasonable pensions". On the Tax Court's findings, which were completely justified and were affirmed, the taxpayer did not have a "plan" to pay "pensions" at all, much less one to pay "reasonable pensions", and thus it is necessarily excluded from the scope of the statute under its own literal construction thereof. The taxpayer points to no circumstances which would compel the conclusion that its trust established a pension plan in a real and substantial sense.

Nor is there merit to the taxpayer's argument that its "plan" was in fact actuarially sound

[4] There was testimony that the intention was to pay amounts on the basis of financial need (R. 82), but the trust provisions do not provide that needy employees shall be eligible, nor do they erect any standards for determination of the amounts payable to this class of employees, if any.

because it as trustee would pay only such pensions as the fund would bear (Pet. 20–21). As a result of its control over the payments to be made, the taxpayer could of course stop payments in order to maintain the solvency of the fund, but the term "actuarially sound", within its ordinary connotation and as detailed in Sections 19.23 (p) (2) and 19.165–1 (e) of Treasury Regulations 103, requires more than the probability of future solvency to be achieved through discontinuance of "pension" payments to the extent necessary to maintain solvency. As the taxpayer itself has stated (R. 65), "this pension trust is not based upon any actuarial computations or liabilities", and its trust thus fails to comply with the statute and the regulations.

The circumstances that the trust was for the benefit of "some" undetermined and undeterminable persons among the taxpayer's employees (Pet. 7) is not alone sufficient to bring it within the statute. While Section 165 of the Code refers to a plan for the exclusive benefit of "some or all" of the employees, this obviously does not mean that the future whim of the employer is to be the only standard for determining the ultimate beneficiaries, with the result that the so-called plan may be operated to favor only one or a few of the employees, or even the key officers or executives.[5]

[5] *Harris* v. *Commissioner*, decided October 27, 1939, by the Board of Tax Appeals (1939 P–H B. T. A. Memorandum

Cf. *Hubbell* v. *Commissioner*, 3 T. C. 626, affirmed 150 F. 2d 516 (C. C. A. 6th). Plainly, the statute contemplates that a plan for "some" of the employees will erect reasonable and nondiscriminatory standards under which those of the employees benefited will be determined. This is confirmed by Section 19.165–1 of Treasury Regulations 103, which prescribes *inter alia* that the pension plan shall be a definite written program communicated to the employees benefited.

There is a further reason why the taxpayer's trust fails to satisfy the provisions of Section 165. As Section 19.165–1 (d) of Treasury Regulations 103 points out, where the employer is in a position to secure indirect benefits in dispensing the fund, it is not, as Section 165 (2) of the Code prescribes that it shall be, impossible for the fund or its income to be diverted to uses other than for the exclusive benefit of employees. The Tax Court seems to have based its decision in part on the fact that the trust was not for the exclusive benefit of employees (R. 36), but in any case the conclusion is compelled that the trust was not one exclusively for their benefit within the meaning of Section 165 (2) and the regulation. Even though the taxpayer can not retake any of the trust property directly (R. 25), it plainly is in a position to derive substantial indirect benefits

Decisions, ¶ 39,472), asserted to be in conflict on this point (Pet. 7, 24–26), has substantially different facts. The trust instrument there designated by name the employees benefited.

because of its complete power to administer and spend the fund and to select the persons to be benefited.[6] Cf. *Stockstrom* v. *Commissioner*, 148 F. 2d 491 (C. C. A. 8th), certiorari denied, 326 U. S. 719; *Stockstrom* v. *Commissioner*, 151 F. 2d 353 (C. C. A. 8th); *Commissioner* v. *Buck*, 120 F. 2d 775 (C. C. A. 2d). While Section 165 (2) is doubtless not concerned with the general indirect benefit which every employer who adopts a pension plan probably derives through increased employee goodwill, the potential benefits to this taxpayer made possible by its complete control over its trust are of a more direct and substantial kind and clearly preclude the trust from being considered as one for the exclusive benefit of employees.

It is to be noted that the amendments made to Sections 23(p) and 165 by Section 162 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which, with respect to plans in effect on or before September 1, 1942, for most purposes became operative for the taxable years commencing after December 31, 1942, establish much more detailed conditions for the application of Sections 23 (p) and 165. Hence the decision in this case is likely to have little future importance.

[6] One illustration could be that the taxpayer might secure desired services from a person whose services were not otherwise obtainable through the promise of almost immediate retirement with maximum benefits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(p) *Pension Trusts.*—

(1) *General rule.*—An employer establishing or maintaining a pension trust to provide for the payment of reasonable pensions to his employees shall be allowed as a deduction (in addition to the contributions to such trust during the taxable year to cover the pension liability accruing during the year, allowed as a deduction under subsection (a) of this section) a reasonable amount transferred or paid into such trust during the taxable year in excess of such contributions, but only if such amount (1) has not theretofore been allowable as a deduction, and (2) is apportioned in equal parts over a period of ten consecutive years beginning with the year in which the transfer or payment is made.

* * * * *

(3) *Exemption of trusts under section 165.—The provisions of paragraphs* (1) and (2) of this subsection shall be subject to the qualification that the deduction under either paragraph shall be allowable only with respect to a taxable year (whether the year of the transfer or payment or a subsequent year) of the employer ending within or with a taxable year of the trust with respect to which the trust is exempt from tax under section 165.

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 165. EMPLOYEES' TRUSTS.

A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of some or all of his employees—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, and

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees,

shall not be taxable under section 161, but the amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him. Such distributees shall for the purpose of the normal tax be allowed as credits against net income such part of the amount so distributed or made available as represents the items of interest specified in section 25(a).

(26 U. S. C. 1940 ed., Sec. 165.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (p)–1. *Payments to employees' pension trusts.*—An employer who adopts or has adopted a reasonable pension plan, actuarially sound, and who establishes, or has established, and maintains a pension trust for the payment of reasonable

pensions to his employees (if the trust is exempt from tax under section 165, relating to trusts created for the exclusive benefit of employees), shall be allowed to deduct from gross income reasonable amounts paid to such trust, in accordance with the pension plan (including any reasonable amendment thereof), as follows:

(a) If the plan contemplates the payment to the trust, in advance of the time when pensions are granted, of amounts to provide for future pension payments, then (1) reasonable amounts paid to the trust during the taxable year representing the pension liability applicable to such year, determined in accordance with the plan, shall be allowed as a deduction for such year as an ordinary and necessary business expense, and in addition (2) one-tenth of a reasonable amount transferred or paid to the trust during the taxable year to cover in whole or in part the pension liability applicable to the years prior to the taxable year, or so transferred or paid to place the trust on a sound financial basis, shall be allowed as a deduction for the taxable year and for each of the nine succeeding taxable years.

(b) If the plan does not contemplate the payment to the trust, in advance of the time when pensions are granted, of amounts to provide for future pension payments, then (1) reasonable amounts paid to the trust during the taxable year representing the present value of the expected future payments in respect of pensions granted to employees retired during the taxable year shall be allowed as a deduction for such year as an ordinary and necessary business expense, and in addition (2) one-tenth of a reasonable amount transferred or paid to

the trust during the taxable year to cover in whole or in part the present value of the expected future payments in respect of pensions granted to employees retired prior to the taxable year, or so transferred or paid to place the trust on a sound financial basis, shall be allowed as a deduction for the taxable year and for each of the nine succeeding taxable years.

* * * * *

Reasonable payments made by an employer during the taxable year directly to pensioners on account of pensions in respect of which no payment has been made to a pension trust shall be allowed as a deduction from gross income for such year as an ordinary and necessary business expense.

In no case will any amount be allowed as a deduction under section 23 (p) and this section for the taxable year which was allowable as a deduction from gross income for any prior taxable year.

* * * * *

SEC. 19.23 (p)–2. *Information to be furnished by employer claiming deductions.*— If a deduction from gross income is claimed under section 23 (p) in an income return or in a claim for refund on account of payments to an employees' pension trust, the employer shall file with such return or claim for refund a statement describing the pension trust plan, including the basis and method of its operation, together with a copy of the trust indenture, with any amendments thereto, and other documents constituting a part of the plan. If all employees are not included as beneficiaries of the pension trust, a statement showing what classes of employees are excluded, and the

general nature of their respective employment and duties, together with the reason why all employees are not covered by the pension trust plan, shall likewise be filed. If such statements have once been filed and if the return contains a statement when and where such statements were filed, they need not again be filed; but, however, if changes in the pension trust plan have been made, a statement showing the nature of such changes (together with copies of any amendments to the trust indenture and other documents constituting a part of the plan) must be filed with the return for the first taxable year for which allowance of deductions under section 23 (p) may be affected by such changes in the pension trust plan.

In addition the following described data and information shall be kept at all times available for inspection by internal revenue officers at the main office or principal place of business of the employer:

1. Schedules or work sheets showing the derivation of the basic valuation factors, or, if such data are not available, a statement giving the source of the factors from which the actuarial valuations were made.

2. (a) Schedules showing the computation of the reserve liability for all employees in the active service as determined from the most recent actuarial valuation. For taxable years beginning after December 31, 1938, the most recent actuarial valuation, for the purposes of this section, means such a valuation made not earlier than five years prior to the filing of the return.

(b) A similar schedule based on the next preceding valuation if such a valuation has been made.

3. A schedule showing by ages the individual current liability factors and the application of these factors in determining the liability accrued during the current taxable year.

4. (a) A schedule showing the computation of the pension liability for all employees retired on pension at the date of the last actuarial valuation.

(b) A schedule showing, by calendar years, the present value of pensions granted from the date of the last actuarial valuation to the end of the taxable year for which the deduction is claimed in an income return or in a claim for refund.

5. A schedule showing the recipts and disbursements of the pension fund during each taxable year carried forward from the date the pension trust was established. The receipts should include the accruals mentioned in 3 above, interest, and any other moneys credited to the fund. The disbursements should include actual pension payments made to retired employees and any other expenditures charged to the pension fund.

If the valuation factors are changed at any time, either because of a change in the pension plan or because of a change in the assumptions upon which the valuation factors are based, the data indicated under 2, 3, and 4 above should be available showing the application of both the old and the new valuation factors to the pay roll as of the valuation date coinciding with or next following the date of the change.

If the pension plan does not contemplate the payment to the trust in advance of the time when pensions are granted, of amounts to provide for future pension payments, the

data described under 2 and 3 above need not be furnished.

* * * * *

SEC. 19.165–1 [as amended by T. D. 4973, 1940–1 Cum. Bull. 65]. *Employees' trusts.*—(*a*) *Plans and trusts for employees.*—A "stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of some or all of his employees" is a definite written program and arrangement communicated to such employees, solely designed and applied to enable such employees to share in the capital or profits of such employer's trade or business or to provide for the livelihood of such employees upon their retirement from employment. A "trust forming part of a stock bonus, pension, or profit-sharing plan" is a trust formed and availed of solely to aid in the proper execution of one of the plans defined in the preceding sentence. This phrase includes only trusts created for the exclusive benefit of employees, and does not include devices for distributing profits to shareholders. All the surrounding and attending circumstances and the details of the plan will be indicative of whether it is a bona fide stock bonus, pension, or profit-sharing plan for the exclusive benefit of employees within the meaning of Section 165.

* * * * *

(d) *Impossibility of diversion.*—As used in section 165 (a) (2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the non-exempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation

or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. It is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, but except as stated in paragraph (e), it must be impossible for trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees. The diversion of substantial amounts of trust funds from one group of employees to another group of employees is not for the "exclusive" benefit of employees even though both groups were covered by the trust, if the employer (or other non-employee) receives substantial indirect benefit thereby, as, for example, through securing greater loyalty from the favored group, or through the shifting of expected pension benefits to a younger group and the postponement of part of the employer's contributions to a later date. As used in section 165 (a) (2), the phrase "purposes other than for the exclusive benefit of his employees" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees covered by the trust.

(e) *Meaning of "liabilities."*—The report of the Senate Committee on Finance on the Revenue Act of 1938 states that the intent and purpose in section 165 (a) (2) thereof (which is identical to section 165 (a) (2) of the Internal Revenue Code) of the phrase "prior to the satisfaction of all liabilities with respect to employees under the trust" is to permit the employer to reserve the right to recover only such balance in the trust at its termination as is "due to erroneous actuarial computations

during the previous life of the trust." An "erroneous actuarial computation" means a mistake of an actuarial character reasonably made by a careful person skilled in calculating the amount necessary to satisfy pecuniary obligations depending on the average length of life of a group of individuals, and of such a type that the employer may reserve the right to recover an amount remaining in the trust because of the mistake without conflicting with the purpose for which section 165 (a) (2) was enacted. For example, if a trust created to supply pensions of $25 a month for 10,000 employees for the remainder of their lives after age 60 has been used to supply such pensions only to 500 employees, an amount remaining in the trust for this reason is not due to such a mistake, but to a change in plan; while if $25 a month after age 60 is paid to the 10,000 employees during their lives, but their average duration of life proves less than might reasonably have been expected, an amount remaining in the trust for this reason is due to an "erroneous actuarial computation." Employers might recover more than amounts resulting from such errors if the term "liabilities" included only such obligations to employees as are legally fixed and certain. Hence, the term was used in the Internal Revenue Code in its broad common meaning to include both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees had nevertheless arisen

which constitute "liabilities" within the meaning of that term. It must be impossible for the employer (or other nonemployee) to recover other than such amounts as remain in the trust because of "erroneous actuarial computations" after the satisfaction of all such fixed and contingent obligations, and the trust instrument must contain a definite affirmative provision to that effect whether the obligations to employees have their source in the trust instrument itself, in the plan of which the trust forms a part, or in some collateral instrument or arrangement forming a part of such plan, and whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.

* * * * *

(g) *Proof of exemption.*—Every trust claiming exemption must prove its right thereto by filing with the collector: (1) an affidavit showing its character, purpose, activities, sources and disposition of corpus and income, and every fact which might affect its status for exemption, (2) verified copies of the trust instrument and of the employer's plan, showing all amendments, and (3) the latest financial statement, showing the assets, liabilities, receipts, and disbursements of the trust. The financial statement must be filed each year, but the documents mentioned in (1) and (2) need not be filed after the first year except when necessary to show changes occurring since the last filing.

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